Evergreen Corp Sdn Bhd v Export-Import Bank of Malaysia Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-265–07 OF 2020
ATAN MUSTAFFA J
18 DECEMBER 2023

Contract — Termination — Validity — Whether bank's unilateral termination of facility agreement and non-disbursement of loan to borrower was valid — Whether facility agreement explicitly provided that loan sum's release was dependent on borrower fulfilling all conditions precedent — Whether borrower's failure in that regard entitled bank to terminate without needing to give borrower notice or warning — Whether any indulgence bank had shown to borrower's attempts to fulfill pending conditions precedent even after time for their compliance had expired did not mean bank had waived right to unilaterally terminate agreement

The plaintiff ('Evergreen') entered into an agreement ('facility agreement') with the defendant ('EXIM') to obtain a USD10.35m loan to construct a factory to recycle used tyres into diesel, carbon black, steel wires and synthetic gas using green technology. Under the 5 June 2017 facility agreement, Evergreen was required to fulfill 30 conditions precedent within one month to qualify for disbursement of the loan sum. Since all the conditions were still not fulfilled by 27 August 2018, EXIM terminated the facility agreement without disbursing the loan. EXIM rejected Evergreen's appeal against the termination. Evergreen then filed the instant action for, inter alia: (a) a declaration that the termination was invalid and that the agreement was still valid and binding as between the parties; (b) an order for specific performance of the facility agreement against EXIM; and (c) damages. Evergreen pleaded that the termination of the facility agreement was wrongful and invalid because: (i) it had fulfilled all the conditions precedent for disbursement of the loan; (ii) EXIM by its conduct of accepting partial or late fulfillment of the conditions precedent had waived its original stand that all conditions precedent must be fulfilled within one month of the date of the facility agreement; (iii) EXIM had failed to specify a new deadline for compliance of the conditions precedent; and (iv) EXIM had never given Evergreen any reminder, warning or notice or an opportunity to remedy any breach before it unilaterally decided to terminate the facility agreement. EXIM, on the other hand, contended that the termination was lawful because: (A) even by the date of the termination letter, Evergreen had not yet fulfilled many of the conditions precedent and therefore its obligation to disburse the loan sum to Evergreen never arose; (B) EXIM had never waived the one-month requirement for compliance with the conditions precedent and was not obliged

to inform Evergreen of any new deadline for compliance or to issue notices or reminders before it decided to terminate; and (C) the facility agreement permitted EXIM to terminate if the financing was not utilised by Evergreen within 12 months of the agreement ('the availability period'), which had lapsed by the time the termination letter was issued.

Held, dismissing the plaintiff's claim:

(1) The court found that the termination of the facility agreement by EXIM was valid as it had the absolute discretion to terminate the facility at any time while the conditions precedent remained unfulfilled by Evergreen (see para 66).

(2) The terms of cl 6.2 and 6.4 of the facility agreement were clear and unambiguous. They entitled EXIM to terminate the agreement as: (a) Evergreen had not yet satisfied some of the conditions precedent. Even when one condition precedent was not met, EXIM could exercise the right to terminate (per cl 6.4); and (b) it was only when Evergreen had fulfilled all the conditions precedent and additional conditions precedent that EXIM was obligated to release the loan sum to Evergreen within the availability period (per cl 6.2) (see para 66).

(3) EXIM could have terminated the facility agreement when the conditions precedent was not fulfilled within one month from the date of the agreement as provided in paragraph A in Schedule 2 of the agreement, but EXIM did not do that. Instead, EXIM allowed Evergreen time to satisfy the conditions precedent even after the one month period had expired. This did not mean EXIM had waived its right to unilaterally terminate as provided in cl 6.4. There was no evidence that EXIM had done so. It was only after the availability period under the facility agreement had expired that EXIM terminated the agreement (see para 67).

(4) The fact that Evergreen did not object when the facility agreement was terminated showed that it accepted the validity of the termination. Evergreen tried further to satisfy the conditions precedent and out of goodwill EXIM entertained the attempt even after the agreement had been terminated. But it was EXIM's right to exercise its discretion to reject Evergreen's appeal against the termination (see para 68).

(5) EXIM's right to terminate under cl 6.4 of the agreement was independent of any time period for compliance with the conditions precedent specified in the agreement. The words employed in cl 6.4 were very clear. They allowed EXIM the absolute discretion to terminate if the conditions precedent were not fulfilled. EXIM was obliged under the agreement to release the funds only if there was complete, and not partial, fulfillment of all the conditions precedent. Evergreen's argument that

EXIM's right under cl 6.4 to unilaterally terminate the facility agreement was void for being oppressive and unfair had no merit. Clause 6.4 did not prevent either party from enforcing its rights. The right to terminate was an operational element of the facility agreement and a term that the parties had contracted for (see paras 69–70 & 73).

[Bahasa Malaysia summary

Plaintif ('Evergreen') telah memeterai perjanjian ('perjanjian kemudahan') dengan defendan ('EXIM') untuk mendapatkan pinjaman USD10.35 juta untuk membina sebuah kilang untuk mengitar semula tayar terpakai ke dalam diesel, karbon hitam, wayar keluli dan gas sintetik menggunakan teknologi hijau. Di bawah perjanjian kemudahan 5 Jun 2017, Evergreen dikehendaki memenuhi 30 pra-syarat dalam tempoh satu bulan untuk pembayaran jumlah pinjaman. Oleh kerana semua pra-syarat masih belum dipenuhi pada 27 Ogos 2018, EXIM menamatkan perjanjian kemudahan tanpa memberikan pinjaman. EXIM menolak rayuan Evergreen terhadap penamatan perjanjian kemudahan itu. Evergreen kemudiannya memfailkan tindakan ini untuk, antara lain: (a) perisytiharan bahawa penamatan perjanjian kemudahan itu tidak sah dan perjanjian kemudahan itu masih sah dan mengikat antara pihak-pihak; (b) perintah untuk pelaksanaan tertentu perjanjian kemudahan terhadap EXIM; dan (c) ganti rugi. Evergreen menghujahkan bahawa penamatan perjanjian kemudahan itu adalah salah dan tidak sah kerana: (i) mereka telah memenuhi semua pra-syarat untuk pembayaran pinjaman; (ii) EXIM dengan tindakannya menerima pemenuhan sebahagian atau lewat pra-syarat dan telah mengenepikan pendirian asalnya bahawa semua pra-syarat haruslah dipenuhi dalam tempoh satu bulan dari tarikh perjanjian kemudahan; (iii) EXIM telah gagal menentukan tarikh akhir baru untuk pematuhan pra-syarat; dan (iv) EXIM tidak pernah memberi Evergreen sebarang peringatan, amaran atau notis atau peluang untuk membetulkan sebarang pelanggaran sebelum memutuskan untuk menamatkan perjanjian kemudahan tanpa persetujuan bersama. EXIM, sebaliknya, berpendapat bahawa penamatan perjanjian kemudahan itu adalah sah kerana: (A) walaupun pada tarikh surat penamatan, Evergreen masih belum memenuhi banyak pra-syarat dan oleh itu tiada kewajipan untuk memberikan kemudahan pinjaman kepada Evergreen; (B) EXIM tidak pernah mengenepikan keperluan satu bulan untuk mematuhi pra-syarat dan tidak diwajibkan untuk memaklumkan Evergreen mengenai sebarang tarikh akhir baru untuk pematuhan atau mengeluarkan notis atau peringatan sebelum penamatan; dan (C) perjanjian kemudahan membolehkan EXIM menamatkannya sekiranya pembiayaan tidak digunakan oleh Evergreen dalam tempoh 12 bulan dari perjanjian ('tempoh ketersediaan'), yang mana ianya telah luput pada masa surat penamatan dikeluarkan.

Diputuskan, menolak tuntutan plaintif:

(1) Mahkamah mendapati bahawa penamatan perjanjian kemudahan oleh EXIM adalah sah kerana mereka mempunyai budi bicara mutlak untuk menamatkan kemudahan pinjaman itu pada bila-bila masa apabila pra-syarat yang dipersetujui masih belum dipenuhi oleh Evergreen (lihat perenggan 66).

(2) Terma-terma klausa 6.2 dan 6.4 di dalam perjanjian kemudahan adalah jelas dan tidak kabur. Ianya memberi hak kepada EXIM untuk menamatkan perjanjian kemudahan itu kerana: (a) Evergreen masih belum memenuhi beberapa pra-syarat sebelum ini. Walaupun satu pra-syarat tidak dipenuhi, EXIM boleh menggunakan hak penamatan (menurut klausa 6.4); dan (b) hanya apabila Evergreen telah memenuhi semua pra-syarat dan pra-syarat tambahan, maka EXIM diwajibkan untuk memberikan kemudahan pinjaman kepada Evergreen dalam tempoh ketersediaan (menurut klausa 6.2) (lihat perenggan 66).

(3) EXIM boleh menamatkan perjanjian kemudahan pinjaman apabila pra-syarat tidak dipenuhi dalam tempoh satu bulan dari tarikh perjanjian seperti yang diperuntukkan dalam perenggan A dalam Jadual 2 perjanjian, namun EXIM tidak berbuat demikian. Sebaliknya, EXIM melanjutkan masa Evergreen untuk memenuhi pra-syarat walaupun selepas tempoh satu bulan telah tamat. Ini tidak bermakna EXIM telah mengenepikan haknya untuk menamatkan perjanjian kemudahan secara unilateral seperti yang diperuntukkan dalam klausa 6.4. Tiada bukti bahawa EXIM telah berbuat demikian. EXIM menamatkan perjanjian hanya selepas tempoh ketersediaan di bawah perjanjian kemudahan telah tamat (lihat perenggan 67).

(4) Fakta bahawa Evergreen tidak membantah apabila perjanjian kemudahan ditamatkan menunjukkan bahawa mereka menerima penamatan perjanjian itu. Evergreen telah berusaha lagi untuk memenuhi pra-syarat yang telah ditetapkan dan EXIM dengan suci hati membenarkan usaha itu walaupun selepas perjanjian itu ditamatkan. Namun EXIM berhak untuk menggunakan budi bicaranya untuk menolak rayuan Evergreen terhadap penamatan perjanjian kemudahan pinjaman itu (lihat perenggan 68).

(5) Hak EXIM untuk menamatkan perjanjian kemudahan di bawah klausa 6.4 adalah bebas dari sebarang tempoh masa untuk mematuhi pra-syarat yang dinyatakan dalam perjanjian. Terma yang digunakan di dalam klausa 6.4 sangat jelas. Ianya memberikan EXIM budi bicara mutlak untuk menamatkan perjanjian kemudahan sekiranya pra-syarat tidak dipenuhi. EXIM diwajibkan di bawah perjanjian untuk memberikan pinjaman hanya sekiranya semua pra-syarat dipenuhi, bukannya sebahagian. Hujah Evergreen bahawa hak EXIM di bawah klausa 6.4 menamatkan perjanjian kemudahan secara unilateral adalah tidak sah kerana menindas dan tidak adil, tidak mempunyai merit.

A Klausa 6.4 tidak menghalang mana-mana pihak dari melaksanakan haknya. Hak untuk menamatkan perjanjian adalah elemen perlaksanaan perjanjian kemudahan pinjaman yang mana ianya telah dipersetujui oleh pihak-pihak (lihat perenggan 69–70 & 73).]

B **Cases referred to**

Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors [2014] 3 MLJ 812; [2014] 10 CLJ 18, CA (folld)

CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2019] 2 MLJ 1, FC (distd)

C *Malayan Banking Berhad v TXN-COAT (Puchong) Sdn Bhd & Ors* [2011] 1 LNS 642, HC (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (folld)

D **Legislation referred to**

Contracts Act 1950 s 29

Hairulallias bin Shaari (with Surya Putra bin Mohamed Taulan) (Putra Taulan & Faiq Azizan) for the plaintiff.

E *Karlos Israphil Bendlin (Amin Karlos) for the defendant.*

Atan Mustaffa J:

[1] This dispute stems from a financing agreement between the plaintiff F industrialist and defendant financier bank that was terminated by the latter. The plaintiff contends that the defendant bank in arbitrary fashion terminated the facility without disbursing the promised sums which remained pending fulfilment of stipulated contractual conditions and prerequisites as would reasonably enable commencement of works towards the recycling plant G construction project. The defendant bank claims non-compliance of said prerequisites for continued financial backing, leading to valid termination owing to unfinished prerequisites despite passage of stipulated time frames. However, the plaintiff avers that it was in total compliance to deserve release of funds per initial contractual expectations and claims of attendant legitimate H expectation in the premises. Hence the core issue at stake here lies in determining whether the termination rested on legal footing or amounted to commercially unreasonable conduct.

BACKGROUND FACTS

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[2] The plaintiff, Evergreen Corporate Sdn Bhd ('Evergreen'), is a company involved in recycling used tires into diesel, carbon black, steel wires and synthetic gas using green technology. The defendant, Export-Import Bank of Malaysia Berhad ('EXIM'), is a financial institution that provides various

financing facilities to domestic and international companies to support development of strategic projects in line with the government's economic objectives. A

[3] In 2016, Evergreen conceived a project to construct and operate on a commercial scale, a thermal decomposition plant with green technology capable of recycling used tires in Simpang Pulai, Perak ('the plant'). The plant would allow Evergreen to increase the output, efficiency and sustainability of its recycling business. B

[4] The proposed capacity was four production lines in the plant, which could process 800 metric tonnes of used tires per day. The end recycled products would comprise of diesel, carbon black, steel wires and synthetic gas. C

[5] The estimated project cost was USD10.35m. As Evergreen did not have sufficient funds, it approached EXIM to secure an Islamic project financing facility. D

[6] On 2 November 2016, EXIM offered an Islamic financing facility of USD10.35m ('the facility') to Evergreen for the construction of the plant and purchase of a Thermal Recovery Unit to be installed in the plant. The offer was revised on 14 February 2017 and 3 April 2017. Subsequently, the parties entered into an Ijarah facility agreement ('facility agreement') on 5 June 2017 where EXIM agreed to grant Evergreen the facility. The facility agreement set out the detailed terms and conditions applicable to the grant and drawdown of the facility. E F

[7] Pursuant to cl 6.2 read together with Schedule 2 of the facility agreement, Evergreen was required to fulfil all the stipulated conditions precedent within one month from the date of the facility agreement, which was by 5 July 2017. There were altogether 30 conditions precedent consisting of 25 conditions precedent and five additional conditions precedent that Evergreen had to comply with. As security for the facility, Evergreen charged a piece of land held under title PN 352495 (formerly HSD 92915), Lot 302294, Mukim Sungai Raya, Daerah Kinta, Negeri Perak ('the land') to EXIM on 27 March 2018. G H

[8] In accordance with the terms of the facility agreement, Evergreen proceeded to take steps and expended funds to fulfil the stipulated conditions precedent, which were pre-disbursement obligations. I

[9] This included making payments to EXIM for fees and deposits, settling professional fees for lawyers and consultants advising on the project, obtaining relevant approvals from authorities, preparing the required documents,

furnishing information/documents to EXIM, evaluating suitable technology providers capable of meeting technical specifications agreed with EXIM, and negotiating the construction contract.

[10] The charge over the land was eventually created and registered in favour of EXIM on 27 March 2018. Other major conditions fulfilled were approval from Department of Environment on 11 June 2018.

[11] On 27 August 2018, EXIM issued a termination notice of the same date ('the termination notice') terminating the facility and the facility agreement on the ground that Evergreen failed to fulfil the conditions precedent within the one month period. Evergreen wrote to EXIM by way of a letter dated 28 September 2018 ('appeal letter') appealing for the facility to be reinstated after it fulfils the conditions precedent. EXIM replied on 8 January 2019 requesting Evergreen to provide documents to support its appeal. Evergreen submitted the requested documents on 21 February 2019. Subsequently, on 27 November 2019, EXIM notified Evergreen that it has rejected Evergreen's appeal request.

[12] On 6 January 2020, Evergreen issued, through its solicitors, a letter of demand to EXIM demanding release of the financing sum. EXIM denied liability on 20 January 2020. As such, on 2 July 2020, Evergreen commenced this suit against EXIM claiming that the termination was wrongful and seeking specific performance of the facility agreement, damages, interests and costs.

EVERGREEN'S CLAIMS

[13] Evergreen is claiming the following in this action against EXIM:

(a) a declaration that EXIM's termination letter dated 27 August 2018 terminating the facility and facility agreement is invalid;

(b) a declaration that EXIM's letter dated 27 November 2019 rejecting Evergreen's appeal to reinstate the facility is invalid;

(c) a declaration that the facility agreement dated 5 June 2017 entered into between the parties is still valid and binding on the parties;

(d) an order of specific performance requiring EXIM to release and disburse the full financing amount of USD10.35m to Evergreen;

(e) damages to be assessed for loss of profits which Evergreen would have made from the project if not for the termination;

(f) damages to be assessed for loss of contracts suffered by Evergreen;

(g) damages for loss of use of the land which Evergreen charged to EXIM as security for the facility;

(h) general damages;

(i) special damages totaling RM21,385,692 comprising capital costs of RM15,513,610 incurred by Evergreen and administrative costs of RM5,872,082 from 2016 to February 2020; and

(j) interest, costs and any other relief deemed fit by the court.

SUMMARY OF EVERGREEN'S CASE

[14] Evergreen contends that EXIM's termination of the facility and facility agreement is wrongful and invalid. Evergreen claims it has fulfilled all the conditions precedent and terms of the facility agreement, yet EXIM suddenly terminated the agreement on 27 August 2018 without disbursing any funds.

[15] Evergreen argues that the one month timeframe stipulated in the facility agreement for Evergreen to comply with all the conditions precedent was unreasonable and impracticable given there were 30 conditions precedent to be fulfilled. The conduct and actions of the parties showed that this timeframe was varied and replaced with a new extended timeframe. However, EXIM failed to specify a new deadline and instead wrongfully terminated based on the original one month timeframe.

[16] Evergreen submits that by its conduct of accepting partial or late compliance of conditions precedent, such as registering the land charge in March 2018 and accepting subsequent payments and documents from Evergreen after July 2017, EXIM had waived the original one month timeframe such that time was no longer of the essence of the contract. Hence, the termination without giving a new timeframe was premature and unlawful.

[17] Additionally, EXIM failed to issue any reminder notice to Evergreen regarding any outstanding conditions precedent or set a new deadline for compliance before the abrupt termination. This denied Evergreen the opportunity to remedy any breach.

[18] Evergreen claims it has suffered substantial losses from this wrongful termination as it was fully prepared to proceed with constructing the plant to commence business operations. Hence, Evergreen seeks a declaration that the termination was invalid, specific performance of the facility agreement, damages to be assessed for loss of profits, costs incurred and interest.

SUMMARY OF EXIM'S CASE

[19] EXIM denies that the termination of the facility and facility agreement was wrongful. EXIM maintains that it validly terminated the facility agreement

as Evergreen failed to fulfil all the stipulated conditions precedent within the one month timeframe from the date of the agreement on 5 June 2017, which Evergreen agreed to per cl 6.2 read with Schedule 2.

[20] EXIM submits that by 27 August 2018 when it issued the termination notice, there were still many outstanding conditions precedent yet to be complied with by Evergreen, despite the one month timeframe having long lapsed. EXIM highlights that Evergreen even admitted in its appeal letter dated 28 September 2018 requesting the facility to be reinstated, that it was still working towards fulfilling all conditions precedent.

[21] Hence, EXIM argues that it was contractually entitled under cl 6.4 to terminate if conditions precedent remained unfulfilled. The question of whether time continued to be of the essence is irrelevant as this clause does not require a specific timeframe to be operative. Further, EXIM was not obliged to provide any reminder notice on outstanding conditions precedent or new deadline prior to termination.

[22] Additionally, the facility agreement also permitted EXIM to terminate if the financing was not utilised within 12 months of the agreement, which had lapsed by 27 August 2018 when it terminated.

[23] EXIM stresses that by accepting late or partial compliance, it neither waived the one month timeframe nor treated time as ceasing to be of the essence. EXIM maintains that termination was valid and lawful, hence it owes no damages to Evergreen which has not suffered any loss.

WITNESSES

[24] Evergreen called five witnesses whose witness statements are marked 'PSSP1' to 'PSSP5' as follows:

(a) SP1 is Andri Arif, the Ketua Jabatan Perancang Bandar (Chief Town Planner) for Majlis Daerah Batu Gajah. His evidence was on Evergreen's application for planning permission and the council's approval process for a green commodity plant project. His witness statement is marked as 'PSSP1';

(b) SP2 is Rohaiza Muhamad, formerly the Programme Director of Corporate Strategy Malaysian Industry-Government Group for High Technology ('MIGHT'). Her evidence was on on her knowledge of the collaboration between Evergreen, MIGHT and EXIM for the development of green technology in Malaysia. Her witness statement is marked as 'PSSP2';

(c) SP3 is Hasimah bt Haris, the Credit Analyst at Credit Guarantee Corp

Malaysia Bhd ('CGC'). Her evidence was on the guarantee and collateral provided by CGC for loan applications of Small and Medium Enterprises, specifically relating to Evergreen and its financing by EXIM. Her witness statement is marked as 'PSSP3';

(d) SP4 is Kwan Meng Kian, the Director of Evergreen. His evidence was on the issues regarding the facility agreement with EXIM, specifically addressing terms and conditions of the agreement, their reasonableness, and the communication and fulfillment of these terms by Evergreen. His witness statement is marked as 'PSSP4'; and

(e) SP5 is Wan Afif Azizul bin Wan Mohamed Aqble, the Director of Evergreen. His evidence was on Evergreen's project involving the recycling of used tires into high-quality fuel using green technology, the financial dealings and agreements with EXIM, and the challenges faced in securing and maintaining the funding for this project. His witness statement is marked as 'PSSP5'.

[25] EXIM called three witnesses whose witness statements are marked 'PSSD1' to 'PSSD3' as follows:

(a) SD1 is Loqman Hakim bin Sofian the Assistant Manager in the Banking Division 3 of EXIM. His evidence was on the validity and cancellation of the facility agreement between Evergreen and EXIM, including discussions on various financial transactions and terms under the agreement. His witness statement is marked as 'PSSD1';

(b) SD2 is Wazir bin Bahatin, the Head of Banking Division 3 of EXIM. His evidence was on Evergreen's failure to comply with the conditions precedent and additional conditions precedent in the facility agreement, leading to its cancellation by EXIM. His witness statement is marked as 'PSSD2'; and

(c) SD3 is Mohammad Azuan bin Abdul Aziz, a practicing lawyer and a partner in the law firm Messrs Azrul Afifi & Azuan. His evidence was on the legal services provided by his firm for EXIM, particularly in preparing and advising on the facility agreement and its related documentation, including the fulfillment of conditions precedent and additional conditions precedent by Evergreen. His witness statement is marked as 'PSSD3'.

ISSUES

[26] After considering the facts of the case and the defences relied on by EXIM, the court frames the following issues for deliberation which this court considers pivotal to the resolution of this case:

(a) whether the cancellation and termination of the facility agreement dated

5 June 2017 by EXIM, as notified on 27 August 2018, were wrongful and invalid, on the grounds that Evergreen allegedly fulfilled all conditions precedent stipulated in the facility agreement, including the conditions precedent and additional conditions precedent, as contended by Evergreen; and

(b) whether the unilateral termination of the facility agreement by EXIM was valid, given its claim that Evergreen failed to meet all precedent conditions within the prescribed period, and considering EXIM's rights under the agreement to terminate the facility at its discretion when the conditions precedent have not been met to its satisfaction.

[27] In the ensuing part of this judgment, this court will structure its deliberations around the issues above.

ANALYSIS AND FINDINGS OF THE COURT

Conditions precedent not met

[28] Evergreen's pleaded case is that the cancellation of the facility and termination of the facility agreement by EXIM vide the termination notice is wrongful, and therefore is invalid, by reason that allegedly it has fulfilled all conditions stipulated in the facility (including the conditions precedent). In this regard, Evergreen pleaded:

[29] Paragraph 12 of the statement of claim:

> 12. The Plaintiff has also conformed and fulfilled the remaining conditions of the said Agreement yet the Defendant has suddenly issued a termination notice of financing facility vide letter dated 27/8/2018.

[30] Paragraph 18 of the statement of claim:

> 18. The Plaintiff has done every effort to fulfill the needs and conditions of the Plaintiff in order to execute the construction of thermal decomposition plant and to obtain the financing facility. These efforts have been successfully done including obtaining the development order and building plan from the Batu Gajah District Council on January and April 2019, confirmation from the Malaysian Industry-Government Group For High Technology (MIGHT) dated 10/5/2019, obtaining the confirmation of 'Sijil Perakuan Perintis' from the Malaysian-Invesment Development Authority (MIDA) dated 18/7/2019 and obtaining grant of RM 2 million from the Northern Corridor Implementation Authority (NCER) on 17/9/2019.

[31] Paragraph 19 of the statement of claim:

> 19. Despite all efforts have been duly done by the Plaintiff and the conditions of the said Agreement have been fulfilled until the Plaintiff has successfully obtaining the Planning Consent from the Local Authority and others as referred above, but the Defendant has still failed and refused to release the financing to the Plaintiff. Among of the conditions which have been fulfilled by the Plaintiff are ...

[32] Evergreen submitted that there was no written or oral notice given by EXIM to Evergreen giving a new deadline before the unilateral termination of the contract by EXIM. No notice or communication was given to Evergreen informing about a new date or warning of Evergreen's failure to comply with the conditions precedent.

[33] In Evergreen's appeal letter dated 28 September 2018 to EXIM, Evergreen appeals to EXIM reconsider the termination of its financing facility. It acknowledged delays in meeting the conditions due to external factors like obtaining necessary environmental approvals and being victims of a scam. Evergreen assured the project's viability and its alignment with national green technology goals. It requested EXIM to reassess its credit and maintain the deposit held, apologising for the delays and emphasising its commitment to pioneering green technology in Malaysia.

[34] EXIM replied to the appeal letter through its letter dated 8 January 2019 requesting Evergreen to provide 14 items. All the documents were prepared by Evergreen as stated in Evergreen's letter dated 21 February 2019 except for one document, the construction contract with Nestcon Builders Sdn Bhd ('Nestcon') which was subsequently submitted to EXIM. Evergreen referred to emails between Evergreen and EXIM dated 27 June 2019 and 8 July 2019 discussing payment to Nestcon and a letter dated 14 September 2017 from Nestcon to Evergreen stating its acceptance as design and build contractor.

[35] EXIM's pleaded case is that contrary to Evergreen's contention that the conditions precedent were satisfied, when EXIM cancelled the facility and terminated the facility agreement, Evergreen had yet, at that time and thereafter, to fulfill all of the stipulated conditions precedent and additional conditions precedent. In relation to this, EXIM submitted as follows:

(a) EXIM referred to cl 6.2 of the facility agreement which provides that EXIM's obligation to make the facility available within the availability period to Evergreen is subject to Evergreen having first fulfilled, among others, all conditions precedent stipulated in Schedule 2 of the facility agreement. Clause 6.2 provides:

Clause 6.2

In addition to the aforesaid, EXIM Bank's obligation to make available the Facility within the Availability Period shall be subject to the fulfilment prior to the Utilisation, of the conditions precedent and the additional conditions precedent as stipulated in Schedule 2 hereof (hereinafter referred to as 'the Conditions Precedent'). Additionally, EXIM Bank's obligation to continue to make available the Facility shall also be subject to the Special Conditions also as stipulated in Schedule 2 hereof.

(b) while Evergreen did fulfil several conditions precedent, cl 6.2 of the facility agreement makes it mandatory for all conditions precedent and additional conditions precedent to be fulfilled and Evergreen is regarded as not having met the mandatory requirement even if there is only one condition precedent or additional condition precedent unfulfilled;

(c) EXIM has shown through SD2 that certain conditions precedent and additional conditions precedent were not met by Evergreen;

(d) Evergreen admitted to EXIM in the appeal letter that it has not fulfilled all the conditions precedent, stating, 'We fervently hope that EXIM Bank will reconsider our financing facility application when our company has met all the conditions stated in the initial letter of offer.';

(e) both SP4 and SP5, Evergreen's directors, admitted in cross-examination that not all the conditions precedent have been fulfilled;

(f) during cross-examination, SP4 was unable to produce documents relating to the conditions precedent in respect of specific security documents to be executed, stamped and presented for registration with the relevant authorities as required in item A(b) in Schedule 2, read together with item 5 ((f), (g), (i) and (j)) in Schedule 1, and the submission of the latest valuation report for the land indicating a market value of not less than RM18m required in item A(q) in Schedule 2 were met; and

(g) the authority's approval for the construction of the project namely, the development approval, relating to the condition precedent under item A(o) in Schedule 2, was obtained only on 29 January 2019, some five months after the facility agreement was terminated on 27 August 2018.

[36] EXIM submitted that as there were still several conditions precedent and additional conditions precedent that remained outstanding, EXIM's 'obligation' to release the financing amount to Evergreen never arose. To support EXIM's position that there is no breach of a bank's obligation when a stipulated condition precedent is not fulfilled, it referred the court to the cases of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings*

Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665 (FC) and *Malayan Banking Berhad v TXN-COAT (Puchong) Sdn Bhd & Ors* [2011] 1 LNS 642 (HC).

[37] EXIM further submitted that there was no evidence adduced by Evergreen to prove that EXIM had waived the requirement for Evergreen to fulfill the remaining conditions precedent and additional conditions precedent still outstanding. Further, there was no necessity for EXIM to remind or follow up with Evergreen on compliance. In support of this submission, EXIM relied on the Court of Appeal decision in *Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors* [2014] 3 MLJ 812; [2014] 10 CLJ 18 (CA).

[38] The court has examined Evergreen's pleadings, and from these, it is clear that Evergreen takes the position that as the conditions precedent were all fulfilled, the termination of the facility agreement by EXIM on 27 August 2018 is a mistake, wrong and void as there was no reasonable reason given and the fact that Evergreen has not breached any provision of the facility agreement. In para 13 statement of claim, it was pleaded:

> The Plaintiff at the material time was in opinion that the termination is a mistake, wrong and void due to there was no reasonable reason given and the fact that the Plaintiff has not breached any provision of the said Agreement.

[39] Therefore, for Evergreen to be successful in establishing that EXIM wrongfully terminated the facility agreement, Evergreen must establish that all the conditions precedent and additional conditions precedent were all fulfilled as pleaded.

[40] However, from the evidence, it is clear that not all the conditions precedent and additional conditions precedent were fulfilled:

(a) SD2's unchallenged evidence clearly shows that certain conditions precedent and additional conditions precedent were not met by Evergreen. In summary SD2's evidence in Q&A 13 and 14 of PSSD2 was that Evergreen failed to meet several conditions precedent and additional conditions precedent by the cancellation date of 27 August 2018. These unmet conditions include the non-receipt by EXIM of various notices and documents related to revenue assignments, project account assignments, performance bonds, legal compliance, and financial obligations. Additionally, Evergreen did not provide a signed construction contract for the Plant, documentary evidence of authority approvals for the project, and a valuation report showing the required market value for the land used as security;

(b) Evergreen admitted to EXIM in the appeal letter that it has not fulfilled all the conditions precedent;

(c) Evergreen's directors admitted in cross-examination that not all the conditions precedent have been fulfilled as of August 2018. SP4 was unable to provide necessary documentation in court to prove compliance with specific security document requirements and a required valuation report for land. Additionally, Evergreen only obtained development approval for its project in January 2019, which was after the termination of the facility agreement in August 2018, indicating several conditions precedent and additional conditions precedent remained unfulfilled; and

(d) the conditions precedent under item A(b), A(o) and A(q) in Schedule 2 of the facility agreement were not met. These conditions precedent are laid out as follows:

(i) item A(b):

> The Facility Agreement and the security documents which are required to be perfected, shall have been duly executed, stamped and presented for registration with the relevant authorities to the satisfaction of EXIM Bank.

(ii) item A(o):

> The relevant documentary evidence satisfactory to EXIM Bank on the authority approval for the construction of the Project and licenses to operate upon completion.

(iii) item A(q):

> A latest valuation report for the Charged Property prepared by EXIM Bank's panel valuer and to be addressed to EXIM Bank indicating the market value of the Charged Property of not less than Ringgit Malaysia of Eighteen Million (RM18,000,000.00).

[41] At the trial, Evergreen, instead of proving that it had satisfied all the conditions precedent and additional conditions precedent, attempted to establish that it had satisfied almost all major conditions precedent. This does not establish the elements required in Evergreen's own pleaded case.

[42] In Evergreen's letter 21 February 2019, it requested EXIM to reconsider the facility. It listed the items required by EXIM for additional due diligence, including various documents, contracts, and approvals, with a status update on each item. Evergreen expresses gratitude for EXIM understanding and support, emphasising its commitment to green technology in Malaysia, and seeks reinstatement of the financing to build an advanced recycling plant.

[43] Evergreen's fulfillment of the items stated in Evergreen's letter dated 21 February 2019 still does not establish that the conditions precedent were

fulfilled. It was only to allow EXIM to reassess Evergreen's financing application after the facility agreement was terminated earlier on 27 August 2018. This is clear from the letter as Evergreen acknowledged, 'Upon further discussion with your team on 9 January 2019, we thank you for the opportunity to reassess our financing facility'. Evergreen knew that it was not a given that even if all the items requested by EXIM were provided, the facility would be reinstated.

[44] In any case, Evergreen failed to comply with the requirement to provide the construction contract with Nestcon. The emails dated 27 June 2019 and 8 July 2019 do not establish that the construction contract with Nestcon was provided. The letter dated 14 September 2017 from Nestcon to Evergreen is not a construction contract. Nestcon merely stated its acceptance as the design and build contractor for the project and its intention to coordinate design and local authority submission work.

[45] As Evergreen did not establish that all the conditions precedent and additional conditions precedent were all fulfilled as pleaded, Evergreen was not successful to prove that EXIM wrongfully terminated the facility agreement and for this reason Evergreen's claim in this action fails.

[46] The court accepts that there is no breach of EXIM's obligation when a stipulated condition precedent is not fulfilled as decided in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 cited by EXIM. The *RHB Bank* case concerns concerns a housing developer's claim against the bank for alleged breaches of financing facilities provided for a housing project development. The housing developer requested an additional RM45,000 facility from the bank, who released only RM2,000 due to the respondent's non-compliance with conditions for detailed expenditure breakdowns. This led to a dispute, with the court needing to assess if the appellant's limited release of funds constituted a breach of agreement. The Federal Court ruled that the bank was not in breach of contract for refusing to release financing sums while conditions precedent stipulated in the financing agreements remained unfulfilled by the developer. It was held, per James Foong FCJ:

> [42] While attempting to revive the project in 1989 after it was stalled in 1987, the respondent had requested from the appellant an additional facility of RM45,000. This was allowed but with conditions attached. According to the respondent, the appellant only released a sum of RM2,000 and this constituted a breach of the agreement.
>
> [43] The High Court, as we have stated earlier, made no finding on this. The Court of Appeal, except narrating that only a sum of RM2000 was released out of a total facility of RM45,000 and the failure of the parties to agree to the scope of a power of attorney to be granted by the respondent to the appellant as security for this loan,

also made no specific ruling on this matter. It is therefore incumbent upon this court to examine the evidence adduced in this case to come up with a decision.

[44] From our perusal of the evidence, we hold the view that the dispute over this matter was due to the reluctance of the appellant to release what was requested by the respondent unless they were strictly payments necessary for the completion of the Taman Dangi project up to the stage of a certificate of fitness for the houses built thereon. For this, the appellant demanded quotations on specific items to be spent. On the contrary, the respondent preferred a general disclosure on how this sum was to be expended in order to revive the project. They requested for an initial lump sum of RM20,000. Instead, the appellant only permitted a sum of RM2,000. The appellant's reason for this limit B was the failure of the respondent to comply with the first condition set out in their letter of offer for this facility dated 17 July 1989 which reads:

> To furnish the Bank with a detail breakdown on cost for purchase of window louver, glass panes, labour cost and other touch up work that need to be done to ensure issuance of Certificate of Fitness from the relevant authorities (Please provide quotations).

[45] *It is not in dispute that the respondent did not comply with this. If this is the case then the appellant was not at fault for D refusing to release the full amount*. For this reason, we find no merit in this ground. (Emphasis added.)

[47] Similarly in *Malayan Banking Berhad v TXN-COAT (Puchong) Sdn Bhd & Ors* [2011] 1 LNS 642 cited by EXIM, a housing developer claimed against the bank for alleged breaches of several financing facilities granted to the developer for a housing construction project by way of a counterclaim. The developer alleged that the bank's refusal to allow drawdown of an additional RM2m trade financing facility, caused the developer's inability to fulfill contracts and losses. The High Court found the bank was not in breach as conditions precedent to further financing were not met. It dismissed the developer's claims of breach and entered judgment for the bank.

[48] The court also accepts that there was no evidence adduced by Evergreen to prove that EXIM had waived the requirement for Evergreen to fulfill the remaining conditions precedent and additional conditions precedent still outstanding and therefore there was no necessity for EXIM to remind or follow up with Evergreen on compliance. The court is guided by the Court of Appeal decision in *Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors* [2014] 3 MLJ 812; [2014] 10 CLJ 18 cited by EXIM. This case concerns a plaintiff company's claim against Bank Islam Malaysia Bhd for breach of contract and failure to allow drawdown of an approved RM1.5m financing facility for acquiring an existing prawn farm, resulting in lost business opportunity and profits. The bank argued non-compliance of stipulated pre-disbursement conditions precedent. The High Court found the bank had waived the conditions and was liable for breach by not disbursing the facility. The Court of

Appeal overturned the decision, ruling that the plaintiff failed to fulfill the acquisition condition precedent, which was not waived. Hence the bank validly terminated the facility and was not in breach of contract. It was held per Ramly Ali JCA (as he then was):

> The issue of this condition precedent is expressly provided for under cl. 6.2(c) of the agreement — that the borrower (first plaintiff) shall have furnished to the bank (the defendant) the relevant documents evidencing its title to and interest in the property. This is a predisbursement condition of the financing facilities that the first plaintiff need to fulfil and comply. The first plaintiff had accepted and signed the said agreement without any complaint or reservation. The first plaintiff was fully aware of the contents of the said agreement. Therefore there is no necessity for the defendant to further communicate or put in writing to the first plaintiff in order to insist its request for the fulfilment and compliance of the said condition by the first plaintiff. There is no provision in the said agreement or other related documents requiring the defendant to do so.

[49] Given also that Evergreen has established that not all the conditions precedent were fulfilled, this also allows EXIM to rely on cl 6.2 of the facility agreement to take on the position that it was not obliged to make the Facility available to Evergreen. Clause 6.2 of the facility agreement provides that EXIM's obligation to make the facility available within the availability period to Evergreen is subject to Evergreen having first fulfilled, among others, all conditions precedents stipulated in Schedule 2 of the facility agreement. This will be addressed in more detail below.

Unilateral termination of the facility agreement

[50] EXIM's case is stated succinctly in EXIM's case summary which is produced in toto below in English:

1. Defendant disputes Plaintiff's entire claim.
2. The termination of the financing facilities amounting to USD10,350,000.00 ('the Financing Facility') by the Defendant is valid as the Plaintiff failed to meet all precedent conditions within the prescribed period.
3. Pursuant to the terms of the Agreement the Defendant has the absolute discretion and reserves the right to terminate the Financing Facility at any time while the previous conditions have not yet been met by the Plaintiff to the satisfaction of the Defendant.
4. Further, the Defendant is entitled to terminate the Financing Facility as the facility was not or failed to be utilised by or disbursed to the Plaintiff within the 'Availability Period' provided in the Agreement.
5. Therefore, the Defendant has no obligation to provide the Financing Facility to the Plaintiff.

[51] EXIM referred the court to the relevant clauses in the facility agreement:

(a) cl 6.2 of the facility agreement states that subject to Evergreen having first fulfilled all the conditions precedent and additional conditions precedent, EXIM was obligated to make the facility available to Evergreen within the 'Availability Period' only;

(b) cl 1.1 of the facility agreement defines 'Availability Period' as 'the period as specified under item 3(c) of Schedule 1 hereto;'. Item 3(c) of Schedule 1 provides:

> Within a period of Twelve (12) months from the date of this Facility Agreement or such other date which shall be deemed to include any extension thereof made by EXIM Bank at its sole and absolute discretion, provided that the first Disbursement/Utilisation shall be made within Three (3) months from the date of this Facility Agreement. Failure to make such Disbursement/Utilisation shall entitle EXIM Bank to revoke/withdraw from granting the Facility.

[52] EXIM submitted that as EXIM never granted Evergreen any extension for the disbursement or utilisation of the facility, the 'Availability Period' ended on 4 June 2018, 12 months from the date of the facility agreement. Pursuant to cl 6.2 EXIM is entitled to cancel the facility at any time after the 'Availability Period' ended, which it did on 27 August 2018, since Evergreen did not utilise the facility within such period due to its failure to fulfil the conditions precedent and additional conditions precedent.

[53] EXIM maintained that Evergreen's delay in utilising or drawing down the facility or its failure to do so within the 'Availability Period' was not attributable to EXIM in any way. EXIM pointed out that Evergreen admitted to this fact and in fact apologised to EXIM for the delay in its appeal letter dated 28 September 2018 after the facility agreement was terminated.

[54] EXIM referred the court to further provisions in the facility agreement:

(a) para A in Schedule 2 of the facility agreement provides that the facility can only be disbursed to or utilised by Evergreen after all the conditions precedent and additional conditions precedent have been met by it:

> Conditions Precedent
>
> Disbursement/Utilisation shall be made after but not limited to the following Conditions Precedent and the Additional Conditions Precedent having been meet. The Conditions Precedent and the Additional Conditions Precedent must be completed within One (1) month from the execution of the Facility Agreement failing which EXIM Bank shall have the absolute right to terminate the Facility Agreement.

(b) cl 6.4 of the facility agreement permits EXIM to terminate the Facility at its discretion whilst the conditions precedent have yet to be met by Evergreen and EXIM's decision in this regard shall be 'final and conclusive':

> Clause 6.4
>
> Pending the fulfilment in manner satisfactory to EXIM Bank of the Conditions Precedent as stipulated, EXIM Bank may at its absolute discretion terminate the Facility or suspend the availability of any Utilisation or issuance pursuant to the Facility and the decision of EXIM Bank shall be final and conclusive and shall not be questioned on any account whatsoever.

[55] EXIM highlighted to the court that after receiving the notice of termination, Evergreen did not challenge the validity of the termination of the facility agreement as confirmed by SP5 in cross-examination:

> PD: Berhubung dengan, saya sekarang merujuk kepada pembatalan kemudahan yang pertama supaya Encik Wan faham, pembatalan pertama dan pembatalan kedua, saya merujuk kepada pembatalan pertama dalam Ogos 2018. Encik Wan setuju bahawa dalam semua komunikasi oleh Evergreen kepada EXIM selepas tarikh pembatalan Ogos 2018, pihak Evergreen tidak ada menyatakan bantahan kepada pembatalan kemudahan tersebut. Menyatakan, kita bantah kepada pembatalan tersebut. Tidak ada?
>
> SP5: Tak ada.

[56] Instead, Evergreen requested EXIM by way of the appeal letter to reconsider its application for the facility and only after EXIM rejected the request did Evergreen take an issue with the termination, demonstrating an afterthought on Evergreen's part.

[57] EXIM submitted that it did not breach the terms of the facility agreement when it cancelled the facility and terminated the facility agreement on 27 August 2018 as it was acting within its express rights under cl 6.2 and/or 6.4.

[58] Evergreen submitted that EXIM did not have a valid right to terminate the facility agreement unilaterally in this case as EXIM cannot rely on the cl 6.4 of the facility agreement allowing termination of the facility agreement unilaterally when a key term such as the period to satisfy the conditions precedent has been varied.

[59] Evergreen further submitted that EXIM cannot terminate the financing unilaterally without giving it an opportunity to remedy any failure or omission.

[60] Evergreen submitted that the clauses in the facility agreement limiting

A the rights of Evergreen as a customer of EXIM was contrary to s 29 of the Contracts Act 1950 and therefore, it was void. Section 29 provides as follows:

> Agreements in restraint of legal proceedings void
>
> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

[61] Evergreen referred the court to the Federal Court case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2019] 2 MLJ 1 (FC) to support the above submission. Here the Federal Court held that where such exclusion clauses are drafted in a manner which effectively limits a party from enforcing its rights under a contract, such clauses would be void and in direct contravention of s 29 of the Contracts Act 1950.

[62] Evergreen argued that the same situation here is present as the unilateral right by EXIM to cancel the agreement is void for being oppressive and unfair to Evergreen.

[63] Evergreen also submitted that EXIM cannot rely on cl 6.3 of the facility agreement to withdraw financing where there is a condition precedent that has not yet been fulfilled as based on the facts was that all major conditions precedent had been met by plaintiff and defendant should have released the funding instead of terminating the agreement.

[64] In reply, EXIM submitted that its right under cl 6.4 of the facility agreement to terminate the agreement is independent of any time period. Therefore, the question of whether time is of the essence or otherwise does not arise at all. The prerequisite to EXIM exercising its right under cl 6.4 of the facility agreement is that there merely must exist, at that time of termination, outstanding conditions precedent and/or additional conditions precedent yet to be fulfilled by Evergreen.

[65] In relation to s 29 of the Contracts Act 1950 and the case of *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* referred to by Evergreen, EXIM argued that these are not applicable and can be distinguished on the facts and law. The issue that arose for determination in the *Anthony Lawrence Bourke* case concerns the validity of a provision in the loan agreement that restraints the borrower's right to file any suit or seek damages against the bank. Contrary to Evergreen's contention, cl 6.4 of the facility agreement does not require EXIM to issue a notice to Evergreen to remedy its failure or omission prior to exercising its right of termination under the provision.

[66] It is the court's finding that the termination of the facility agreement by EXIM is valid as it had the absolute discretion to terminate the facility at any time while the previous conditions have not yet been met by Evergreen to the satisfaction of EXIM. The terms of cll 6.2 and 6.4 of the facility agreement are clear and unambiguous which entitled EXIM to terminate the facility agreement as:

(a) Evergreen has not yet satisfied some of the conditions precedent. Even when one of the conditions precedent is not met, EXIM can exercise that right to terminate (cl 6.4); and

(b) it is only when Evergreen has fulfilled all the conditions precedent and additional conditions precedent that EXIM was obligated to make the facility available to Evergreen within the availability period (cl 6.2).

[67] Taking this further, EXIM could have terminated the facility agreement when the conditions precedent were not met by Evergreen within one month from the execution of the facility agreement as provided in para A in Schedule 2 of the facility agreement, but this EXIM did not do. Instead, EXIM allowed Evergreen to attempt to satisfy the conditions precedent even after the expiry of the one month. But this did not mean that EXIM waived its right to unilateral termination as provided in cl 6.4. There was no evidence that EXIM did so. It was only after the availability period of the facility expired that the facility agreement was terminated.

[68] The fact that Evergreen did not object to the termination of the facility agreement on 28 September 2018 shows that Evergreen accepted that the termination was valid. Evergreen tried further to satisfy the conditions precedent and as a matter of goodwill EXIM entertained Evergreen after the termination of the facility agreement, but it was EXIM's right to exercise its discretion to reject the appeal by way of its letter dated 27 November 2019.

[69] Although Evergreen argued that EXIM cannot rely on the cl 6.4 of the facility agreement to terminate the facility agreement unilaterally when the period to satisfy the conditions precedent has been varied, I do not find this to be relevant. I agree with EXIM's submission that EXIM's right under cl 6.4 of the facility agreement to terminate the agreement is independent of any time period. The words employed in cl 6.4 are very clear. EXIM 'may at its absolute discretion terminate the Facility' as long as the conditions precedent are left unfulfilled. In relation to this, I also reject Evergreen's submission that EXIM should have released the funding as all major conditions precedent had been met. It is clear that the fulfilment of major conditions precedent does not oblige EXIM to release the funds. It must be complete fulfilment.

[70] Evergreen's argument that the unilateral right by EXIM to cancel the agreement is void for being oppressive and unfair to Evergreen, following the *Anthony Lawrence Bourke* case does not have merit.

[71] In the case, the purchasers of a property sued their bank for negligence and breach of contract for its failure to make a progressive payment to a housing developer which resulted in the termination of the sale and purchase agreement between the housing developer and the purchasers. In its defence, the bank relied on an exclusion clause which reads as follows:

> Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, and all such loss and damages are expressly disclaimed.

[72] Rightly, the Federal Court held that the exclusion clause which sought to restrict the purchasers from enforcing their full rights was void under the Malaysian Contracts Act.

[73] Here, cl 6.4 does not restrict Evergreen from enforcing its rights in court. It is only a clause that preserves EXIM's rights to terminate the facility or suspend the availability of any utilisation or issuance pursuant to the facility when conditions precedent are not fulfilled. This relates to an operational element of the facility, not the right to enforce rights in court and was a term which the parties have contracted for.

CONCLUSION

[74] Premised on my findings above, it is the judgment of this court that Evergreen has failed to prove its claim on a balance of probabilities and the whole of its claim is dismissed. Costs of RM150,000 is ordered for EXIM.

Plaintiff's claim dismissed.

Reported by Ashok Kumar